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Information Security Oversight Office  
Washington, DC 20405



July 18, 1989

MEMORANDUM FOR: Vincent Garvey, Freddi Lipstein  
Civil Division, Department of Justice

FROM: Steven Garfinkel *Steve*  
Director, Information Security Oversight Office

SUBJECT: GAP letter on settlement negotiations

Enclosed is a copy of a letter that I received today from Thomas Devine of the Government Accountability Project. The letter requests "the administration's, and your position" on three statements that I allegedly made during the settlement conference on June 27. Each of the statements is a gross distortion of what I actually said. For example, he claims that I stated "that the criteria to classify documents are meaningless." If there were a recording of the meeting, it would reveal that what I actually said was that the classification categories listed in Executive Order 12356 are so broadly stated as to be virtually meaningless in prescribing what information could be classified and what information could not be classified; and, as a result, the other tests [criterial] for classification were far more critical to the process. Mr. Devine's other two indirect quotes are equally distorted, seemingly to portray me as some kind of classification extremist.

I suppose that I was under the impression that settlement conferences are intended to be both candid and privileged. Mr. Devine's letter seems to suggest that our discussions are simply more fodder for another media offensive. In any event, I turn to you as my litigation counsel for your advice about whether we respond to Mr. Devine's letter and, if so, how we respond. My own perspective is now obviously clouded by my desire to "set the record straight."

## GOVERNMENT ACCOUNTABILITY PROJECT

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July 14, 1989

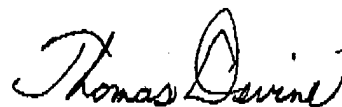
Mr. Steven Garfinkel  
Director  
Information Security Oversight Office  
General Services Administration  
Room 6406  
General Services Building  
Washington, D.C. 20406

Dear Mr. Garfinkel:

This letter is to request your explanation for several comments at the June 27, 1989 settlement meeting on the lawsuits challenging nondisclosure agreements administered by your office. One statement was that the criteria to classify documents are meaningless. The second was that if plaintiffs in the lawsuit insisted on markings for all classified documents, the response would simply be to mark everything classified. The third was that all prior compromises on the nondisclosure agreements were simply the products of manipulation by a few "kooks."

GAP's client Mr. Lou Brase finds these comments deeply disturbing, as has everyone else who heard them -- including myself. Perhaps they were made offhand or should not be taken seriously. If so, please precisely describe the administration's and your position on each of these issues. Your response will have a significant impact on the positions Mr. Brase takes in any future settlement discussions.

Sincerely,



Thomas Devine  
Legal Director

td/GAR



Philstein:jmn

35-16-2794

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Washington, DC 20530

July 7, 1989

Ms. Patti Goldman  
Public Citizen Litigation Group  
2000 P Street, N.W. Suite 700  
Washington, D.C. 20036

Re: AFGE v. Garfinkel, D.C. Cir. No. 89-5402  
NFFE v. United States, D.C. Cir. No. 89-5404  
AFSA v. Garfinkel, D. D.C. No. 88-0440-OG

Dear Ms. Goldman:

Pursuant to our discussion of June 27, 1989, regarding settlement of these cases, we have discussed the concerns raised by the plaintiffs in these cases and believe we can agree to the following:

1. Although the issue of notice to former employees is outside the lawsuits, the agencies would agree to provide notice of the removal of the term "classifiable" from all nondisclosure agreements and notice of the definition of "classified information" to former federal employees. This notice would be through sources in addition to the Federal Register, such as union newsletters and retired agents' associations' newsletters. The specific publications would be agreed upon by the parties at such time as agreement on all issues is reached. As we discussed, actual personal notice such as has been required for current employees is not feasible for former employees.

2. With respect to efforts to identify unmarked classified information that is subject to the nondisclosure agreement obligations, as we explained at the meeting, the focus really cannot be on information alone. Instead, in determining whether an employee will be held liable for unauthorized disclosure of classified information, including unmarked classified, all agencies consider the totality of circumstances, including, but not limited to, the content of the information itself, the employee's access to classified information, the employee's position, the employee's prior experience with classified information, and the circumstances surrounding the disclosure. The agencies would be amenable to stating these general criteria

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by way of additional explanation in the existing regulations. Because the determination of liability in each case of an unauthorized disclosure depends on all the facts of that disclosure, the agencies do not believe it would be useful to provide factual or descriptive examples by way of additional guidance since no example would apply to any situation that differed from the specific facts of that hypothetical.

In response to your suggestion that a clear statement be provided of the liability standard as a negligence standard, we have reviewed the current nondisclosure agreement forms, the ISOO regulation and the DCI's clarification to the Form 4193, and we conclude that they currently establish a negligence standard. Accordingly, it would appear that the parties are in agreement as to the standard for liability for unauthorized disclosure of classified information, and we see no need for additional statements on this issue.

3. As we observed at the meeting, we remain concerned that section 630 will continue to be re-enacted and provide the basis for additional lawsuits even if these cases are settled. We understand that you represent several members of Congress who were the moving forces behind section 630, and that the union plaintiffs were strong lobbyists for section 630. You represented that efforts would be undertaken to forestall future re-enactments of section 630's provisions. We would appreciate some more definite statement of what those efforts will be as well as an agreement to provide copies to government counsel of all communications with Congress on this matter, letters, testimony and any other efforts that are made to prevent the re-enactment of section 630.

4. Finally, since these lawsuits were filed, the government has made many changes in the nondisclosure agreements as well as in its regulations in order to accommodate the concerns raised by section 630. We are reluctant, therefore, to undertake additional obligations that have not been required either by statute or court order absent some assurance that the issues raised in these cases will not resurface. Accordingly, the obligations the government is willing to assume, described in 1 and 2 above, are contingent on settlement of all issues in all three of these cases.

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I look forward to your response to the government's efforts to reach an amicable settlement to this case.

Very truly yours,



Freddi Lipstein

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